IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 121 of 2006

Decided on : July 21, 2006

Ram Chand and others **…..Appellants.**

VERSUS

Ram Dass and others **…..Respondents.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?[1]

For the Appellants : **Mr. G.D. Verma, Senior Advocate, with Mr. B.C. Verma, Advocate.**

For the Respondents : **Mr. G.C. Gupta, Senior Advocate, with Mr. Mohinder Gautam, Advocate.**

Surjit Singh, Judge (Oral)

Heard and gone through the record.

2. Appellants-plaintiffs, claiming themselves to be owners in possession of the land, bearing Khasra Nos.268/65 and 264/79, situate in village Khalag, Tehsil and District Shimla, filed a suit against the respondents-defendants alleging that the said defendants had, sometime in December, 1997 started making encroachment upon the said land while raising construction of a house on their adjoining land, bearing Khasa No. 266/79. It was alleged that earlier a single storeyed cow-shed of the defendants existed on the adjoining land, bearing Khasra No.266/79, and that that cow-shed collapsed about 6-7 years back and thereafter the defendants, while constructing new house on the site of that cow-shed, made encroachment upon the

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Whether the reporters of the local papers may be allowed to see the Judgment?

adjoining land of the plaintiffs. It was also alleged that as a matter of fact the old cow-shed of the defendants stood at lower level compared to the level of the land of the plaintiffs and that while constructing the new house they had made encroachment to the extent of about 2 mtrs. in breadth on the upper side, which is the part of the land of the plaintiffs. It was further alleged that the plaintiffs came to know about the encroachment when they obtained demarcation in April, 1999 from the Revenue agency.

3. Suit was contested by the respondents-defendants. They denied that they had made any encroachment upon the land of the plaintiffs. They asserted that their new house stood on the site of the old cow-shed and in case it was found that any part of the land of the plaintiffs was under their house, they had acquired title by prescription, because earlier their cow-shed stood on that site and after the collapse of the cow-shed they had constructed their new house on the same site.

4. Appellants-plaintiffs proved the report of the Kanoongo, who carried out the demarcation in April, 1999. The trial Court did not accept the said report and returned the finding that there was no evidence of encroachment and consequently dismissed the suit. Appeal filed by the plaintiffs in the Court of District Judge also stands dismissed. The first Appellate Court has also observed that demarcation report relied upon by the appellants-plaintiffs is not correct, the demarcation having not been carried out in accordance with the instructions and the guidelines issued by the superior revenue authorities.

5. Learned counsel for the appellants has urged that when the demarcation report relied upon by the plaintiffs was found to be not correct on account of the instructions, the guidelines, and the procedure, having not been followed, there was no alternative for the two Courts below but to appoint a Local Commissioner, even though no request for appointment of Local Commissioner had been made by either side. In support of this argument, he has placed reliance upon a judgment of this Court in ***Bali Ram v Mela Ram and another, AIR 2003 HP 87.*** Vide para-13 of the judgment, it has been held as follows:

> **"13.** Rule 9 of Order 26 of the Code of Civil Procedure (hereafter referred to as 'the Code'), empowers the Court to issue commission to make local investigation which may be required for the purpose of elucidating any matter in dispute. Though the object of the local investigation is not to collect evidence which can be taken in the Court, but the purpose is to obtain such evidence, which from its peculiar nature, can only be had on the spot with a view to elucidate any point which is left doubtful on the evidence produced before the Court. To issue a commission under Rule 9 of Order 26 of the Code, it is not necessary that either or both the parties must apply for issue of commission. The Court can issue local commission suo motu, if, in the facts and circumstances of the case, it is deemed necessary that a local investigation is required and is proper for the purpose of elucidating any matter in dispute. Though exercise of these powers is discretionary with the Court, but in case the local investigation is requisite and proper in the facts and circumstances of the case, it should be exercised so that a final and just decision is rendered in the case.**"**

6. From a reading of the aforesaid paragraph, it is clear that the object of the local investigation is not to collect the evidence for any party but to elucidate any point, which is left doubtful by the evidence produced before the Court. No doubt, in the present case, the two Courts below have categorically held that the demarcation report relied upon by the plaintiffs cannot be used as a piece of evidence in support of the allegation of encroachment, but other evidence on record leaves no doubt that the newly constructed house of the defendants-respondents stands upon the site of the old cow-shed. As already noticed, in the plaint it is alleged that while constructing the new structure the defendants extended the construction on the upper side of the site of the old cow-shed to the extent of 2 mtrs. breadth and that on upper side the land of the plaintiffs is situated. However, while in the witness box, one of the plaintiffs, namely Ram Chand, PW-1, when confronted with an earlier part of his own statement that the plaintiffs had an old wall towards the property of the defendants and that the house of the defendants had been constructed on a site, the level of which is lower than the level of the site of the said wall, stated that the land of the plaintiffs was not only on the upper side of the site of the house of the defendants but also on the lower side, meaning thereby that he contradicted the averment made in the plaint that the respondents-defendants while raising the construction of the new house extended the site towards the upper side which belongs to the appellants-plaintiffs. Not only this, it has come in the statement of this very plaintiff that as a matter of fact the ground floor of the new building of

the defendants was constructed in the year 1992 and in December 1997 the defendants started constructing a storey above the ground floor and thereafter in 1999 demarcation was obtained. He admitted that earlier his father had filed a suit in the year 1992 when the defendants started constructing the ground floor of the new house and that that suit was not for possession but only for injunction as the defendants had not left any set-off area out of their property and that that suit had been dismissed in default. The fact that in the year 1992 when the ground floor of the building was constructed/was being constructed, the father of the plaintiffs did not make any allegation of encroachment, suggests that the house of the defendants has been constructed on the site of the old cow-shed. In the face of this evidence there was hardly any need for the appointment of any Local Commissioner, because no doubtful point was left in the evidence.

7. For the foregoing reasons, I do not find any merit in the appeal. In any case, no substantial question of law arises. The appeal is dismissed.

(Surjit Singh)
Judge.

July 21, 2006(sd)